

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

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U.S. BANKRUPTCY COURT
ALBUQUERQUE, N.M.

In re:

FURR'S SUPERMARKETS, INC.,

Debtor.

No. 11-01-10779 SA

**OBJECTION OF WEINGARTEN REALTY INVESTORS
TO DEBTOR'S MOTION FOR ORDER APPROVING SALE
OF SOME OR ALL OF DEBTOR'S OPERATING ASSETS**

Weingarten Realty Investors, a creditor and party-in-interest in the above-styled bankruptcy case, through its attorneys of record, Butt, Thornton & Baehr, P.C., objects to the Debtor's Motion for Order Approving Sale of Some or All of Debtor's Operating Assets, as follows:

FACTUAL BACKGROUND

Weingarten Realty Investors is the Lessor under the following Shopping Center Leases by which the debtor operates supermarkets at the leased premises:

1. Shopping Center Lease between La Cuesta Limited Partnership, lessor, and Safeway Stores, Incorporated, lessee, dated July 22nd, 1983, and Short Form Lease dated July 25, 1983, as modified by First Shopping Center Lease Modification Agreement dated March 8, 1984 and assigned to Furr's, Inc., as lessee, by the Second Shopping Center Lease Modification Agreement dated October 29, 1987, and assigned to Weingarten Realty Investors, as lessor, on March 31, 1995. The leased premises are located at 2280-B, Wyoming N.E., Albuquerque, New Mexico.

On information and belief, the supermarket operated at the leased premises is known as debtor's store #878. The rent obligations of debtor are set out in paragraph 2 of the Shopping Center Lease. Under paragraph 27, debtor is also obligated to pay a pro-

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rata share of common area assessments. Debtor is similarly obligated to pay a pro-rata share of taxes under paragraph 26 of the Shopping Center Lease. The Shopping Center Lease does not contain a use restriction, but may be assigned under paragraph 13 only for retail or service purposes.

2. Shopping Center Lease between Dale Ballamah Land Co., Inc., as lessor and Safeway Stores, Incorporated, as lessee dated July 29, 1975, as modified by Lease Modification Agreement dated February 9, 1976, Second Lease Modification Agreement dated February 10, 1977, Third Lease Modification Agreement dated May 24, 1977, Fourth Lease Modification Agreement dated June 9, 1978, and Fifth Lease Modification Agreement dated June 23, 1980, and as assigned to Furr's, Inc., as lessee by the Assignment and Assumption Agreement between Safeway Stores and Furr's, Inc., dated October 29, 1989. The leased premises are located at North Towne Shopping Center, 5901-N Wyoming N.E., Albuquerque, New Mexico, but is listed in Schedule "2" to the Motion as being located at 5815 Wyoming NE, Albuquerque, New Mexico.

On information and belief, the supermarket operated by the debtor at the leased premises is referred to as debtor's store #886. Paragraph 30 of the Shopping Center Lease limits the use of the leased premises to use for a general mercantile business. Under Paragraph 13, the lease may only be assigned to another grocery supermarket operator who operates a chain of not less than three other supermarkets. Debtor's rent obligations are as set forth in paragraph 2 of the Shopping Center Lease. In addition, under paragraph 27, debtor is obligated to pay a pro-rata share of common area assessments and, under paragraph 26, to pay a pro-rata share of taxes.

3. Shopping Center Lease and Corrected Original Lease between Coronado Hills Shopping Center, Inc., as lessor and Safeway Stores, Incorporated, as lessee, dated June 19, 1959, as modified by the Addendum dated April 13, 1960, the Lease Modification Agreement dated August 16, 1962, the Lease Modification Agreement dated August 27, 1963, Lease Modification Agreement dated March 7, 1973, Lease Modification Agreement dated August 2, 1973, Lease Modification Agreement and Addenda dated May 27, 1976,

Lease Modification Agreement dated February 24, 1977, Lease Modification Agreement dated July 30, 1979, and as assigned to Furr's, Inc., as lessee, by Assignment and Assumption Agreement dated October 29, 1987, and to Furr's Supermarkets, Inc., as lessee, by Assignment and Assumption of Real Property Lease dated March 11, 1991. The leased premises are located at 6021 N. Mesa, El Paso, Texas.

On information and belief, the supermarket operated by debtor at the leased premises is known as debtor's store # 947. Debtor's rent obligations under the Supermarket Lease are set out in paragraph 2 of the February 24, 1977 Lease Modification Agreement. Under the February 24, 1977 Lease Modification Agreement, debtor is also obligated to pay a pro-rata share of common area assessments, and, under the July 30, 1979 Lease Modification Agreement, to pay a modified pro-rata share of property taxes. Paragraph 24 of the Shopping Center Lease limits the use of the leased premises to use as a grocery store, only.

OBJECTIONS OF WEINGARTEN REALTY INVESTORS

I. The Debtor's Motion Contravenes the Disclosure Requirements of Chapter 11

The goal of a Chapter 11 case is the proposal, approval, and confirmation of a plan, whether of reorganization or of orderly liquidation. *In re Mold Makers, Inc.*, 124 B.R. 766, 767 (Bankr. N. D. Ill. 1990). The primary purpose is to arrive at a plan for the debtor's financial rehabilitation after full and fair disclosure, and then to have the court approve the plan to make it binding on all competing interests. *In re Mold Makers, Inc.*, 124 B.R. at 767. Full disclosure is the pivotal concept in reorganization under the Bankruptcy Code. Lawrence P. King, 7 *Collier on Bankruptcy* (15th Rev. Ed. 2000).

Although the Bankruptcy Code permits the sale of a debtor's assets outside the ordinary course of business prior to confirmation of a chapter 11 plan, there are limitations on such a sale. *In re Lionel Corp.*, 722 F.2d 1063, 1071 (2nd Cir. 1983); *In re Continental Air Lines, Inc.*, 780 F.2d 1223, 1226 (5th Cir. 1986). In order to obtain approval of a sale of the debtor's assets outside the ordinary course, the debtor must demonstrate: (1) a sound business justification for conducting the sale prior to confirmation; (2) that there has been adequate and reasonable notice of the sale; (3) that the sale has been proposed in good faith; and (4) that the purchase price is fair and reasonable. *In re Lionel Corp.*, 722 F.2d at 1071.

Section 363 of the Bankruptcy Code does not authorize a debtor to circumvent the requirements of a reorganization plan by establishing the terms, in secrecy, in connection with a proposed transaction. *In re Continental Airlines, Inc.*, 780 F.2d at 1226; *In re Braniff Airways, Inc.*, 700 F.2d 935 (5th Cir. 1983). Where a proposed transaction specifies terms for adopting a reorganization plan, the debtor may not bypass the disclosure requirements of Section 1125, the voting requirements of Section 1126, the best interest of creditors test of Section 1129(a)(7), or the absolute priority requirements of Section 1139(b)(2)(B). *In re Continental Airlines, Inc.*, 780 F.2d at 1226; *In re Braniff Airways, Inc.*, 700 F.2d 935 (5th Cir. 1983).

The Court should permit a debtor to conduct a sale under Section 363(b) without meeting the disclosure and voting requirements of chapter 11 only in exceptional circumstances. This Court has held that the debtor must establish not

only a sound business justification, but also facts demonstrating the existence of an emergency or, in the absence of an emergency, other compelling circumstances supporting the sale. *In re Allison*, 39 B.R. 300, 301 (Bankr. D.N.M. 1984).

In this case, the debtor has failed to establish any of the requirements for a sale of some or all of its assets under Section 363 prior to the proposal or approval of a plan. Weingarten objects to the Motion on the grounds that debtor has failed to demonstrate a sound justification, adequate notice and good faith in proposing a sale of some or all of its assets outside the ordinary course of business.

First, Weingarten objects to the Motion because the debtor has failed to advance any adequate business justification for conducting the sale outside the ordinary course and without full disclosure of the procedures for and terms of the sale. The only reasons advanced by the debtor for the extraordinary relief requested in its Motion is that some parties have expressed an interest in the purchase of some or all of the debtor's assets and that incurring the administrative expenses of a chapter 11 proceeding is burdensome to the debtor.

The interest of parties in the purchase of some or all of a debtor's assets and the accrual of administrative expenses are circumstances that exist in virtually every chapter 11 proceeding. These are not the compelling circumstances that justify a sale without complying with the disclosure requirements that are the foundation of a chapter 11 proceeding.

Further, Weingarten objects to the Motion on the grounds that the debtor has failed to provide adequate and reasonable notice of the sale. The notice is inadequate both as to timeliness of the notice and as to the substance of the notice.

The notice given by debtor provides for objections to be filed no later than Thursday, June 21, 2001. However, the proposed auction is to take place on Monday, June 25, 2001, less than five business days later. The notice is inadequate under the Rules of Bankruptcy Procedure and does not permit time for the objection of any creditor to be heard and determined by the Court prior to the sale. Fed.R.Bankr.P. 6004, 9006(a), and 9014. See, also, *In re Robert L. Hallamore Corp.*, 40 B.R. 181 (Bankr. D. Mass. 1984) (notice should specify the date of a hearing scheduled prior to the sale in the event objections are filed and specify that no hearing will be held if no objection is filed).

The notice is also inadequate as to substance. Rather than proceeding with two separate motions, one for approval to conduct the sale outside the ordinary course and one for approval of the sale, the debtor's Motion combines both without full disclosure of the terms of either. The Motion does not include the proposed Form Asset Purchase Agreement, which was to be filed with the Court by June 6, 2001. The Form Asset Purchase Agreement was, on information and belief, not filed until June 13, 2001. The Form Asset Purchase Agreement that was filed leaves blank many material terms, and does not include the schedules and exhibits listed in the Form, most particularly, the form of assumption agreement. The Form Asset Purchase Agreement also addresses only the terms of a purchase of all the debtor's assets, and does not specify sales terms for purchase of less than the total assets, which is contemplated by the auction.

Further, the Form Asset Purchase Agreement does not necessarily set out the actual terms of the sale. The actual terms may materially deviate from the

form, and are not to be provided to creditors and interested parties until after the sale actually takes place and after the time for objections has expired. Absent timely disclosure of the terms of the sale, creditors are not afforded an adequate opportunity to fully assess and make their objections to the sale.

Further, Weingarten objects to the extent the sale may not have been proposed in good faith. First, the Motion states that a purchaser will be required to acknowledge that it is acquiring the assets on an "as is, where is" basis, relying solely on the purchaser's own due diligence. The Asset Bidding Procedures provided by the debtor, however, require that any prospective bidder undertaking due diligence must sign an onerous confidentiality agreement that prohibits the prospective bidder from proposing or supporting any plan other than one proposed by the debtor.

Second, the Motion provides that the debtor has the sole discretion to determine which bid or combination of bids constitutes the best offer for the assets. The debtor is given sole authority to decide which bid or bids are in the best interests of the debtor, the estate, and the creditors.

Third, the Motion provides that the debtor may negotiate a Proposed Sale prior to the auction and may grant the buyer in a Proposed Sale a break-up fee or other similar consideration. The Motion does not identify any terms on which such a break-up fee might be granted, and permits inequitable treatment of interested bidders by the debtor.

Last, the Motion seeks to have the Court determine that any purchaser will have purchased the assets in good faith within the meaning of Sections 363(m)

and (n) of the Bankruptcy Code. The provisions of Sections 363(m) and (n) relate to a factual determination by the court upon a request for relief from a sale that has been authorized. This determination should not be foreclosed prior to and without opportunity for any interested party to discover the actual bid procedures and terms, and the facts and circumstances of the actual sale.

II. THE DEBTOR'S MOTION FAILS TO AFFORD THE PROTECTIONS AFFORDED LANDLORDS UNDER SECTION 365

Wcingarten Realty Investors is the landlord under three unexpired shopping center leases. Section 365 of the Bankruptcy Code gives lessors of non-residential real property certain valuable protections in exchange for the lessor's forbearance from pursuing default remedies. The purpose behind Section 365 is to balance the state law contractual rights of the lessor to receive the benefit of its bargain with the federal law equitable right of the debtor to have an opportunity to reorganize. This is accomplished by requiring the debtor to abide by the contract provisions during the pendency of the bankruptcy and cure any pre-petition defaults upon assumption while prohibiting the lessor from enforcing any pre-petition remedies. *In re Circle K Corp.*, 190 B.R. 370, 375 (9th Cir. BAP 1995), *aff'd*, 127 F.3d 904 (9th Cir. 1997).

By its Motion, the debtor seeks an order: (1) approving the assumption and assignment of such of the debtor's executory contracts and unexpired leases as the purchaser agrees to take at the auction; (2) determining that the defaults set forth in the Motion are the only defaults under the debtor's executory contracts and unexpired leases that must be cured as a condition to assumption and assignment; and (3) determining, as provided by section 365(k) of the Bankruptcy

Code, that upon the assumption and assignment of any agreements under the Motion, the debtor shall be released from all obligations under such agreements.

A. The Debtor's Motion Fails to Provide for Cure of the Entire Default.

Section 365(a) of the Bankruptcy Code provides that, with some limitations, the trustee or debtor-in-possession, subject to the Court's approval, may assume or reject any executory contract or unexpired lease of the debtor. One of the important limitations on the debtor's right to assume a lease is the debtor's obligation to cure any default under the lease. 11 U.S.C. § 365(b)(1)(A). Section 365(b)(1) provides a guarantee to the non-debtor party, who may be forced to continue a relationship it would rather terminate, that as a condition to the forced continuation of the contractual relationship, any losses or defaults existing at the time will be satisfied either through a timely cure or through reasonable assurances of future payment. *In re National Gypsum Co.*, 208 F.3d 498, 508 (5th Cir. 2000).

Weingarten Realty Investors objects to the debtor's Motion on the grounds that it does not provide for cure of all defaults under the leases with Weingarten Realty Investors. Although the amounts set forth in Debtor's Schedule "2" fairly accurately reflect the pre-petition default, Schedule "2" and the Motion omit any provision for cure of debtor's default in its 2001 obligations to pay property taxes and common area maintenance fees. Weingarten estimates the cure amount for the lease at 2280-B Wyoming N.E., Albuquerque, New Mexico to be the \$39,750.91 reflected in Schedule "2" plus an addition \$18,451.44 (est. 2001 tax

rebill), for a total of \$58,202.35. Weingarten also estimates the cure amount for the lease at 6021 N. Mesa, El Paso, Texas to be \$17,613.86, as indicated in Schedule "2" plus \$7,776.00 (est. 2001 tax rebill) for a total cure amount of \$25,389.86. The cure amount for the 5901-N Wyoming N.E., Albuquerque, New Mexico location is approximately the \$21,292.00 listed in Schedule "2" subject to adjustments for possible common area assessment credits.

In addition, Weingarten objects to the Motion because it does not state when the defaults will be cured. The Motion references the Form Asset Purchase Agreement and states that "all sales will provide for the cure of any defaults under any contracts or leases to be assumed and assigned" but neither the Motion nor the Form Asset Purchase Agreement indicate when the default will be cured. To the extent that the debtor's sale contemplates cure of such defaults other than immediately upon assignment of the leases, Weingarten objects to such assumption and assignment.

B. Debtor's Motion Fails to Provide Adequate Assurance of Future Performance.

Another important limitation on a debtor's right to assume an executory contract or unexpired lease is the debtor's obligation to provide adequate assurance of future performance under the lease. 11 U.S.C. § 365(b)(1)(C). Section 365(b)(1)(C) states:

"If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee . . .
(C) provides adequate assurance of future performance under such contract or lease."

Similarly, as a condition to assigning an executory contract or unexpired lease of the debtor, adequate assurance of future performance by the assignee of such contract or lease must be provided. 11 U.S.C. § 365(f)(2). An unexpired lease may be assigned only if the trustee or debtor assumes the lease in accordance with the provisions of section 365 and the trustee or debtor provides adequate assurance of future performance by the assignee of such lease, whether or not there has been a default in the lease. 11 U.S.C. § 365(f)(2)(A) and (B).

In the case of unexpired shopping center leases, such as the Weingarten leases, adequate assurance of future performance includes adequate assurance of: (1) the source of rent and other consideration due under such lease; (2) that the financial condition and operating performance of the proposed assignee will be similar to the financial condition and operating performance of the debtor as of the time the debtor became the lessee under the lease; (3) that assumption and assignment is subject to all the provisions of the lease, including provisions such as use or exclusivity provisions; and (4) that assumption or assignment of the lease will not disrupt any tenant mix or balance in such shopping center. 11 U.S.C. § 365(b)(3)

Satisfaction of the requirements of both Sections 365(b)(1)(C) and 365(f)(2)(B) depends on whether the prospective assignee can provide adequate assurance of future performance. Congress intended that the words “adequate assurance” be given a practical, pragmatic construction, and is to be determined under the facts of each particular case. No guarantee is required, but the lessor must be given adequate assurance of future performance so that it will be

protected from having to take on the burden of a tenant who may be likely to default on his lease obligations after the assumption and assignment have occurred. *In re Bygaph*. 56 B.R. 596, 605 (Bankr. S.D.N.Y. 1986).

Weingarten objects to debtor's Motion because it fails to provide any assurance of future performance. The identity of any proposed assignee or assignees is not disclosed. With respect to the undisclosed assignee or assignees, no business or financial information of any kind has been furnished. Debtor has not disclosed the source of rent and other consideration due under the leases, nor has it offered any assurance that the financial condition and operating performance of the proposed assignee will be similar to the financial condition and operating performance of the debtor as of the inception of the leases. Furthermore, debtor has offered no assurance that the assignment will be subject to the use or assignment restrictions contained in the leases for the stores located at 2280-B Wyoming NE, Albuquerque, New Mexico, 5901-N Wyoming N.E., Albuquerque, New Mexico, and 6021 N. Mesa, El Paso, Texas.

C. Debtor's Motion Exceeds the Scope of the Release Under Section 365(k).

Assignment of an executory contract or unexpired lease assumed under Section 365 of the Bankruptcy Code relieves the debtor and the estate from any liability for any breach of such contract or lease occurring after the assignment. 11 U.S.C. § 365(k). Section 365(k) changes the common law rule and relieves the estate of liability, which is analogous to a novation. *In re Anchor Resolution Corp.*, 231 B.R. 559, 562 (D. Del. 1999), *aff'd in part and reversed in part on other grounds*, *American Flint Glass Workers Union v. Anchor Resolution Corp.*,

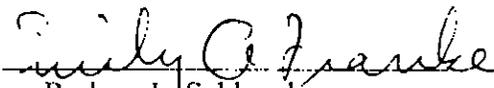
197 F.3d 76 (3rd Cir. 1999); *Wainer v. A.J. Equities, Ltd.*, 984 F.2d 679, 683 (5th Cir. 1993).

The debtor seeks to expand the reach of the release afforded by Section 365(k) by relieving the debtor of liability for pre-petition defaults, as well. The Motion seeks an order “determining, as provided by Section 365(k) of the Bankruptcy Code, that upon the assumption and assignment of any agreements under this Motion the debtor shall be released from all obligations under such agreements” without regard to when such obligations accrue or accrued. The difference between the relief requested by the debtor in its Motion and that afforded by Section 365(k) is significant in a case such as this, where the debtor has not stated the time frame in which lease defaults will be cured and has not offered adequate assurance of performance by any assignee. If the Court enters an order allowing the debtor to assume and assign its leases and providing that the assignee is to cure any defaults, and the assignee fails to cure, then the lessor under the leases will have no claim against the estate or the debtor for any liabilities existing as of the date of the assumption and assignment. The plain language of Section 365(k) mandates a contrary result. Therefore, Weingarten objects to the Motion to the extent it seeks to exceed the relief afforded by Section 365(k).

Wherefore, Weingarten Realty Investors respectfully requests that the Court deny the Debtor’s Motion for Order Approving Sale of Some or All of Debtor’s Operating Assets and Granting Related Relief.

Respectfully submitted,

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pleading on this 21st day of
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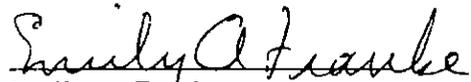
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